A-1132

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

Supreme Court, U.S.
FILED
CLERK

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
April 14, 1998

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SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

Petitioner, Angel Francisco Breard, by counsel, files this supplemental brief in support of his Application for Stay of Execution. The execution is scheduled for April 14, 1998. Breard will also file a motion for leave to file a petition for writ of habeas corpus in the Court and an application for stay of execution pursuant to it. All three of these filings are prompted by the ruling of the International Court of Justice on April 9, 1998, that the United States keep Breard alive until that court can complete proceedings brought by Paraguay against the United States.

Breard, a citizen of Paraguay born in Argentina, filed his original (and, until today, only) federal habeas corpus petition on August 30, 1996, based in part upon Virginia's violation of the Vienna Convention on Consular Relations in connection with his case. Two weeks after Breard's petition was filed, the Republic of Paraguay, its Ambassador to the United States and its Consul-General filed a federal complaint (denoted hereafter as the Paraguay suit) based upon the same facts as Breard's Vienna Convention claim, seeking declaratory and injunctive relief against several officials of the Commonwealth of Virginia to vindicate rights conferred upon Paraguay and the Consul-General by the Vienna Convention. After the Fourth Circuit Court of Appeals affirmed the District Court's dismissal of both cases,[1] the Circuit Court for Arlington County set April 14, 1998, as the date for Breard's execution. A copy of this order is attached as Exhibit A.

The plaintiffs in the Paraguay suit filed a Petition for Certiorari in the Court on February 24, 1998. Republic of Paraguay v. Gilmore, No. 97-1390. On March 11, 1998, Breard filed a Petition for a Writ of Certiorari in the Court. Breard v. Greene, No. 97-8214. On March 22, 1998, the Paraguay plaintiffs filed an Application for Stay of or Injunction Against Execution pending Disposition of Petition for Certiorari. On March 30, 1998, Breard filed an Application

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[1]Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).

for Stay of Execution based upon his Petition for Certiorari. Both Petitions for Certiorari and Applications for Stay are pending in the Court. The Court, by order dated April 8, 1998, invited the Solicitor General to present the views of the United States on both the Breard and Paraguay cases by 5:00 p.m. on April 13, 1998.

On April 3, 1998, pursuant to Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S., 261, the Republic of Paraguay filed in the International Court of Justice (the "ICJ") an Application and a Request for Interim Measures of Protection in a case concerning the proceedings brought against Angel Francisco Breard: Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). Copies of those documents are attached as Ex. B. The interim measures of protection sought included: (1) that the Government of the United States take the measures necessary to ensure that Breard not be executed pending the disposition of the case in the ICJ, and (2) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision the ICJ may render on the merits of the case. After hearing oral argument on April 7, 1998, the ICJ entered a Order joined in by the entire 15 member court, on April 9, 1998, attached as Ex. C, indicating that:

> The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.

In a concurring declaration, attached as Ex. D, the ICJ's President Stephen M. Schwebel, of the United States, stated:

> It is of obvious importance to the maintenance and development of a rule of law among states that the obligations imposed by treaties

> be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Breard respectfully presents this development to the Court as an additional reason to stay his execution. First, it will allow the Court adequate time to consider the ICJ's ruling and the implications to the United States of complying with its request, on the one hand, or disregarding it on the other. To do the latter, that is, to refuse to honor an order of a unanimous World Court may have serious implications for the United States and particularly its "peripatetic" citizens. Additional time would also allow the political processes to work themselves out. The Executive Branch apparently does not have the authority to carry out the ICJ's order directly. And according to press reports the Governor of Virginia is relying on the courts -- rather than his own discretion or requests of the Executive Branch -- to tell him what to do about the ICJ's order.[2]

A stay of execution with respect to a pending petition for certiorari should be granted if it is reasonably probable that four members of this Court would consider any of the underlying issues sufficiently meritorious for a grant of *certiorari*, there is a significant possibility that the decision of the Court of Appeals will be reversed, and irreparable harm is likely to result if the decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). Here, however, the Court is faced, perhaps for the first time, with the interplay of the ICJ's ruling (and role) and the Court's

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[2] *See* Richmond Times Dispatch (Frank Green) April 10, 1998, p. A12 (Ex. E):

> "Asked [Governor] Gilmore's reaction to the international court's ruling, his spokesman, Mark A. Miner, said yesterday that 'the governor will continue to follow the U.S. courts and the United States Supreme Court.'"

Petitions for Clemency and a Reprieve (the latter grounded on the ICJ's ruling) have, of course, been filed with the Governor nonetheless.

undisputed supremacy in domestic judicial matters. For instance, the Court may consider that given the preeminence of the United States and its emphasis on the rule of law, it might reject worries about violated sovereignty and defer its ruling until the ICJ renders a final adjudication.

For instance, one of the issues submitted by Paraguay to the ICJ is a request that the ICJ adjudge and declare:

> that the United States is under an international obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention.

Ex. B at 9, IV.25(3).

The ICJ's views on this matter might be useful to the Court in considering Breard's petition for certiorari.

If the ICJ determines that Paraguay's Vienna Convention rights were violated and that this violation should be remedied by a new trial, and in particular if it decides that the United States is under an international obligation not to apply procedural default rules in a case such as this, it is reasonably probable that four members of the Court will consider the underlying issues sufficiently meritorious for a grant of *certiorari*, and there is a significant possibility that the decision of the Court of Appeals will be reversed. The final factor for the Court to consider in order to grant a stay of execution -- that irreparable harm is likely to result if the decision is not stayed -- is indisputable. Breard will die on April 14, 1998, unless his execution is stayed.

As Judge Butzner of the Court of Appeals noted in his concurring opinion in this case,[3] the Convention affects Americans who travel abroad each year and who might be taken into custody by officials of another country. If America's domestic courts fail to provide any legal

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[3]Breard v. Pruett, 134 F.3d at 622.

remedy when the ICJ has determined that a remedy should be provided to an alien who was convicted in this country and given what some nations deem a "barbaric" sentence of death without the knowledge or intervention of his consulate, the United States is in no position to protest if another country's procedural rules are used to the same effect against Americans detained abroad.

CONCLUSION

For all these reasons, the Court should stay Breard's execution pending disposition of his Petition for a Writ of Certiorari in this case or until further Order of the Court

Respectfully submitted,

ANGEL FRANCISCO BREARD

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CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed and sent by Federal Express overnight delivery service for Saturday delivery to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April 10, 1998.

Alexander H. Slaughter